(3) No. 88-23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LAURO LINES s.r.l.,

Petitioner,

v.

SOPHIE CHASSER, ANNA SCHNEIDER, ILSA KLINGHOFFER and LISA KLINGHOFFER, as Co-Executrixes of the Estate of LEON and MARILYN KLINGHOFFER, VIOLA MESKIN, SEYMOUR MESKIN, SYLVIA SHERMAN, PAUL WELTMAN, EVELYN WELTMAN, DONALD E. SAIRE and ANNA G. SAIRE, CHANDRIS CRUISE LINES, ABC TOURS TRAVEL CLUB, CHANDRIS (ITALY) INC., PORT OF GENOA, ITALY, CLUB ABC TOURS, INC., and CROWN TRAVEL SERVICE, INC., d/b/a RONA TRAVEL and/or CLUB ABC TOURS, and CLUB ABC TOURS, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MORRIS J. EISEN
233 Broadway
New York, New York 10279
(212) 341-8394
Counsel of Record

MORRIS J. EISEN
ARTHUR M. LUXENBERG
KENNETH A. SCHACHTER
MORRIS J. EISEN, P.C.
233 Broadway
New York, New York 10279
(212) 341-8394
Of Counsel

QUESTION PRESENTED FOR REVIEW

Is an order of a United States District Court denying enforcement of a foreign forum selection clause appealable as a collateral final order?

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-against-

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Respondents SOPHIE CHASSER, VIOLA and SEYMOUR MESKIN, PAUL and EVELYN WELTMAN, SYLVIA SHERMAN and ANNA SCHNEIDER respectfully request that this Court deny the

petition for writ of certiorari, seeking review of the opinion of the Court of Appeals for the Second Circuit in this case. That opinion is reported at 844 F.2d 50.

OPINIONS BELOW

The United States Court of Appeals for the Second Circuit, by Circuit Judge Kearse, decided on April 7, 1988 that the interlocutory order of the United States District Court for the Southern District of New York, Louis L. Stanton, Judge, denying defendant, ACHILLE LAURO's motion to dismiss the present actions on the basis of forum selection clauses contained in cruise ship tickets of passage was not appealable, and thus granted plaintiffs' motion to dismiss defendants appeals for lack of appellate

jurisdiction. (Appendix A, pp. 1a-14a)*.

The Hon. Louis L. Stanton, of the United States District Court for the Southern District of New York denied defendants' motion to dismiss on the grounds of a forum selection clause contained in the cruise ship ticket of passage, in an Order dated October 21, 1987, entered October 23, 1987 (Appendix B, pp. 15a-18a).

The District Court in finding that the ticket of passage did not reasonably communicate its terms and conditions to the passengers, noted:

> "(T)he cover reference is unobtrusive rather than eye catching. It merely draws attention to the shipowner's

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* Numbers in parentheses refer to pages in Petitioner, LAURO LINES' Petition for a Writ of Certiorari.

terms and conditions and does not explicitly state that the ticket represents a contract affecting the passengers substantial rights." (17a)

Judge Stanton discussing the significance of the forum selection clause stated:

"(T)he effect of Clause 31 (venue provision) is immediately and irrevocably to divest the passenger's right to sue anywhere except before the judicial authority in Naples.

Yet, the contract is at least indirectly ambiguous on that point." (17a) (emphasis added)

Furthermore, as observed by Judge Stanton:

"(A)s a whole, I find that the ticket does not give fair warning to the American citizen passenger that he or she is renouncing and waiving his or her opportunity to sue in a domestic forum over a contract made and delivered in the United States." (18a)

JURISDICTIONAL STATEMENT

The order of the Court of Appeals for the Second Circuit, dated and entered April 7, 1988, properly dismissed the appeal of petitioner, LAURO LINES, noting that the order of the District Court was neither a collateral order appealable as a "final decision" under Section 1291 of the Judicial Code, 28 U.S.C. Section 1291, nor an order 'refusing ... [an] injunction[ ]' under Section 1292(a)(1) of the Judicial Code, 28 U.S.C. Section 1292(a)(1). Thus, the Supreme Court of the United States should not exercise its discretion to review the order of the United States Court of Appeals.

STATEMENT OF THE CASE

In October of 1985, terrorists effortlessly gained admittance to the cruise ship, ACHILLE LAURO, in the midst of a cruise in the Mediterranean. The Palestinian Liberation Organization terrorists seized the ship holding hostage the passengers and crew members. Plaintiffs and other passengers were held captive under threat of having the ship blown up, and constantly under an unrelenting threat of death. As a result of the seizure and diversion of cruise ship, ACHILLE LAURO, plaintiffs were severely injured, threatened, denied adequate shelter, food and drink, proper sanitary facilities, medical attention and put in fear of their health and life. Plaintiff, LEON KLINGHOFFER was shot dead in cold blood and thrown overboard.

Defendants, in the United States District Court for the Southern District sought the enforcement of a forum selection clause, which was set forth in tiny type and buried deep within the confines of the ticket of passage for the ACHILLE LAURO, requiring that all disputes be litigated before the judicial authority in Naples. The ticket of passage contract did not reasonably communicate the importance of its terms and conditions to the passengers, as was noted by Judge Stanton in his decision for the District Court (Appendix B, pp. 15(a)-18(a)). The Achille ticket had but one reference on the outside of the ticket directing passengers to read the terms contained therein. The notice on the outside of the ticket directing passengers to the terms and conditions printed inside, specifically the venue provision at

Article 31, was insufficient to incorporate the term into the contract of passage. Moreover, Article 31 (venue provision) was excluded from the specifically approved articles listed in the concluding provision, in the last sentence of the terms of the passage ticket, thus leading a U.S. passenger to conclude that the right to venue in an action in a U.S. Court had not been waived. By equivocating on the applicability of the venue provision within the ticket of passage, the defendants cannot, as rightly decided by Judge Stanton, attempt to enforce such an adhesive, harsh provision, that was so ineffectually drawn. Furthermore, due to the fact that the plaintiffs received their passage tickets at the airport on the date of departure, notwithstanding the numerous requests made by plaintiffs to

obtain their tickets prior to that date, it was impossible to cancel or renegotiate alternative terms in the contract of passage, signed by neither party.

In The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972) in an opinion by Chief Justice Burger, the Supreme Court held that a forum selection clause should be specifically enforced unless it could be shown that enforcement would be unreasonable and unjust or that the clause was invalid for such reasons as fraud or overreaching (407 U.S. 1). Justice Burger, discussing England as the choice of forum in the Bremen contract stated:

> "The choice of that forum was made in an arm's length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts." (407 U.S. at 12) (emphasis added)

It can hardly be maintained that The Bremen stood for enforcement of forum selection clauses in passenger tickets. Justice Burger, quoted Judge Wisdom from the Court of Appeals in The Bremen, reflecting the singular business nature of the contract at issue:

> "But this was not simply a form contract with boilerplate language that Zapata had no power to alter. The towing of an oil rig across the Atlantic was a new business. Zapata did make alterations to the contract submitted by Unterweser. The forum clause could hardly be ignored. It is the final sentence of the agreement, immediately preceding the date and the parties signatures ..." 428 F.2d 888, 907 (407 U.S. at 12, Note 14) (emphasis added)

The contracting parties in The Bremen were businessmen, experienced in the exigencies of international business, as manifested by their commercial agreement which reflected the legitimate expectations of the parties. In the

instant action, the effect of Judge Stanton's ruling was that the passengers of the Achille Lauro should not be held to the boilerplate language in the passage contract ticket, which they had no power to alter.

The Achille Lauro passage contract ticket was made and delivered in the U.S. The expectations of the passengers on the Achille Lauro were those of tourists on a cruise; not that they would be subjected to international terrorism and not that they would be forced into the courts of a foreign land to litigate a dispute arising therefrom.

In The Bremen, Justice Burger further stated:

> "There is strong evidence that the forum selection clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum

> clause figuring prominently in their calculations." (407 U.S. at 14) (emphasis added)

In the instant action, the only vital part of the agreement, aside from the fixed price passengers would pay, was that in return for such consideration the passengers would participate in a pleasure cruise in the Mediterranean on the Achille Lauro.

REASONS FOR DENYING THE WRIT

Pursuant to 28 U.S.C. Section 1291 the courts of appeals have jurisdiction to review "final decisions" of the district courts. A judicially created exception to the "final decision" rule codified in Section 1291, allowing immediate appeals for orders collateral to the merits of an action that cannot be reviewed after final judgment, was

established in Cohen v. Beneficial Loan Corp., 337 U.S. 541, 546 (1949):

> "This decision (District Court's denial of corporations motion to require plaintiff in stock-holder's derivative action to post security for reasonable expenses of defendant) appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

In the instant action, the Court of Appeals held that the District Court's denial of defendant, ACHILLE LAURO's motion to dismiss on the basis of the forum selection clause, which left the controversy pending, was not a final decision within the meaning of 28 U.S.C. Section 1291, and therefore dismissed the appeal (5a). Reflecting the fact that the District Court's determination will be

reviewable after a final disposition on the merits, the Court of Appeals, construing prior U.S. Supreme Court decisions, stated:

> "The Court has made it clear that when an interlocutory order will be reviewable on appeal from a final judgment, the mere fact that ultimately it might appear that an interim reversal would have been more efficient, or that the party against whom the order is entered may have difficulty in persuading the appellate court to reverse after a final judgment, is not a reason to grant immediate review." (7a) (emphasis added)

For an order to fall within the narrow exception to the final decision rule of 28 U.S.C. Section 1291 created by the decision in Cohen, it must satisfy a three prong test set forth by the Supreme Court in Coopers & Lybrand v. Livesay, 437 U.S. 463, 468-469. 57 L. Ed. 2d 351, 98 S. Ct. 2454 (1978):

> "To come within the 'small class' of decisions excepted from the final-judgment rule by Cohen, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment. Abney v. United States, 431 U.S. 651, 658, 52 L. Ed. 2d 651, 97 S.Ct. 2034 (1977), United States v. MacDonald, 435 U.S. 850, 855, 56 L. Ed. 2d 18, 98 S.Ct. 1547."

Review of the District Court's order is available following a trial. The order is not separate from the merits of the cases themselves. Accordingly, the District Court's order is not appealable as a collateral order under Section 1291.

In the instant action, the Court of Appeals, in holding that the refusal to dismiss on forum selection grounds is not "effectively unreviewable on appeal from a final judgment", stated:

> "We see no reason why denial of a motion to dismiss on the basis of a contractual forum-selection clause should be any less subject to correction upon appeal from a final judgment

> than are denials of motions for dismissal on grounds of improper venue or of forum non conveniens." (8a, 11a)

The reasoning employed by the Court of Appeals for the proposition that the denial of the enforcement of a forum-selection clause is not a final decision unreviewable on appeal is that: "the right to secure adjudication in a particular forum is not lost simply because enforcement is postponed". (12a)

The Supreme Court has recently emphasized that the supposedly reduced chance of reversal from litigating a case to conclusion in order to appeal an adverse pre-trial ruling does not satisfy the requirement that a decision be effectively unreviewable on appeal from a final judgment. Stringfellow v. Concerned Neighbors in Action, 107 S.Ct. 1177, 1182-83 (1987).

The Supreme Court has stated the public policy furthered by precluding immediate review of every trial court ruling, which would impose, as would the granting of certiorari in the instant action, unreasonable disruption, delay and expense:

> "It would also undermine the ability of district judges to supervise litigation. In Section 1291 Congress has expressed a preference that some erroneous trial court rulings go uncorrected until the appeal of a final judgment, rather than having litigation punctuated by 'piecemeal appellate review of trial court decisions which do not terminate the litigation'". United States v. Hollywood Motor Car Co., 458 U.S. 263, 265, 73 L. Ed. 2d 754, 102 S.Ct. 3081 (1982) [Merrell-Richardson, Inc. v. Koller, 472 U.S. 424, 430, 86 L. Ed. 2d 340, 105 S.Ct. 2757 (1985)] (emphasis added).

The Court in Merrell-Richardson delineated the reach of the exception to the final decision rule of Section 1291 propounded in the Cohen case:

> "The collateral order doctrine is a 'narrow exception' Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374, 66 L. Ed. 2d 571, 101 S.Ct. 669 (1981), whose reach is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal". See Helstoski v. Meanor, 442 U.S. 500, 506-508, 61 L. Ed. 2d 30, 99 S.Ct. 2445 (1979); Abney v. U.S., supra at 660-662. (Merrell-Richardson, supra, at 430-431) (emphasis added).

As noted above, in the instant action, the right to enforce a contractual forum selection clause is not lost simply because enforcement is postponed by the denial of a motion to dismiss on the basis of such a clause, which ruling is clearly subject to correction upon appeal from a final judgment. As a result, the denial of the enforcement of the forum selection clause was plainly not a right "irretrievably lost" by the absence of an immediate appeal.

The policy in support of the finality requirement imposed by Congress transcends the possibility that additional litigation expenses will be incurred by a party resulting from an erroneous ruling, as reflected by the Court in Merrell-Richardson [quoting Lusardi v. Xerox Corp., 747 F2d 174, 178 (CA3 1984)]:

> "If the expense of litigation were a sufficient reason for granting an exception to the final judgment rule, the exception might well swallow the rule!" See Coopers and Lybrand, supra, 437 U.S. at 476 (Merrell-Richardson, supra at 436).

The facts present in the instant action do not warrant overturning the strong policies, set forth below, in favor of upholding the Section 1291 final judgment rule. The right to enforce the forum selection clause, buried deep within the Achille Lauro passenger ticket in tiny type (17a), remains open, and thus no

grounds for an immediate appeal exist. See Cohen, supra, 337 U.S. at 546.

Discussing the import of preserving the effectiveness of the final decision rule of 28 U.S.C. Section 1291, the Supreme Court, in Mitchell v. Forsyth, 472 U.S. 511, 544, 86 L. Ed. 2d 411, 105 S.Ct. 2806 (1985), stated:

> "The rule respects the responsibilities of the trial court by enabling it to perform its function without a court of appeals peering over its shoulder every step of the way. It preserves scarce judicial resources that would otherwise be spent in costly and time-consuming appeals. Trial court errors become moot if the aggrieved party nonetheless obtains a final judgment in his favor, and appellate courts need not waste time familiarizing themselves anew with a case each time a partial appeal is taken. Equally important, the final judgment rule removes a potent weapon of harassment and abuse from the hands of litigants." (emphasis added).

The decision of the District Court, in the instant action, must not be disturbed prior to a full determination on the merits. The District Court must not be continually burdened by the Court of Appeals "peering over its shoulder" occasioned by the piecemeal appeal pursued by defendants, for the ostensible purpose of harassment and delay.

As if grasping at a fistful of straws, petitioner, LAURO attempts to invoke the statutory exception to the finality doctrine contained in 28 U.S.C. Section 1292(a)(1) which allows appeals of interlocutory orders that deny or otherwise pertain to injunctions. By some inexact analogy, the defendant would have this Court entertain the notion that the denial of a motion to dismiss due to the existence of a forum selection clause is akin to an injunction. As stated by the

Court of Appeals in the instant action: "We do not regard the denial of a motion to dismiss on forum-selection grounds as the equivalent of the denial of a motion for an injunction within the meaning of Section 1292(a)(1). (13a). Even if the denial of such a motion was somehow identical to the denial of an injunction, as stated by the Supreme Court in Stringfellow v. Concerned Neighbors in Action, supra, at 1184:

> "This Court has made it clear that not all denials of injunctive relief are immediately appealable; a party seeking review also must show that the order will have a 'serious, perhaps irreparable, consequence' and that the order can be 'effectually challenged' only by immediate appeal." Carson v. American Brands Inc., 450 U.S. 79, 84, 101 S.Ct. 993, 996, 67 L. Ed. 2d 59 (1981) [quoting Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181, 75 S.Ct. 249, 252, 99 L. Ed. 233 (1955)] (emphasis added).

As previously set forth, the ACHILLE LAURO, as well as the other defendants, can challenge the District Court's order denying the motion to dismiss following a trial. And, indeed, there has been no showing that any irreparable harm will result by foregoing an immediate appeal. Accordingly, Section 1292(a)(1) is not available as an avenue by which to appeal.

In its petition for a writ of certiorari, petitioner, LAURO LINES, attempts to depict that a conflict exists between the decisions of "five Courts of Appeals" with respect to whether the denial of a motion to dismiss on the basis of a forum selection clause is appealable as a collaterally final order (10). A close reading of the cases cited by defendant in support of this argument reveals that the alleged "conflict"

between the circuits is nothing more than a smoke screen set up by defendant in order to allure this Court into exercising its discretion to review the instant writ.

The Third Circuit's decision in General Engineering Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352 (3rd Cir. 1986) was predicated on the decision of the divided panel in Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd., 709 F.2d 190 (3rd Cir.), cert. denied, 464 U.S. 938 (1983), and embodied a recognition that orders denying a pre-trail motion to enforce a forum selection clause are immediately reviewable by courts of appeal. 783 F.2d at 355. However, it is important to emphasize the differences between the facts underlying the Third Circuit's decision in both General Engineering and Coastal Steel and

the facts in the instant action. In General Engineering the dispute was between Martin Marietta Alumina, an owner of an aluminum plant, and General Engineering, a contractor that had been awarded "a construction contract for the installation of electrical equipment." 783 F.2d at 354-55. The construction contract included a clause in which the parties, sophisticated businesses each, agreed to litigate all actions in the "courts of the State of Maryland." Id. at 354. In Coastal Steel, the dispute again was between commercial entities, stemming from the construction of "an in-line steel working plant in turn-key condition." 709 F.2d at 192. In Coastal, the contract provided for the resolution of disputes "by the English Courts of Law." Id. at 193.

In the instant action, by

contrast, the dispute is between passengers on a cruise ship and the vessel's owners. Rather than a contract negotiated at arm's length between commercial parties of equal standing culminating in the signing of a mutually agreed upon contract, the passenger ticket supplied by defendant, ACHILLE LAURO, was an effort to unilaterally impose upon the plaintiffs the boilerplate language, in tiny type (17a), of the forum selection clause in an attempt to limit suit to Naples, Italy. In short, the equitable considerations underlying the Third Circuit's decisions in Coastal Steel and General Engineering are entirely absent from the instant action. Thus, on the facts alone, the Third Circuit's doctrine of appealability is not applicable.

In Rohrer, Hibler & Replogle, Inc. v. Perkins, 728 F.2d 860 (7th Cir.

1984), the Seventh Circuit refused to entertain an appeal from an order denying a remand to the Circuit Court of Cook County, which had been designated in a contract forum selection clause. The panel emphasized that the district court's order, which refused to enforce the clause, "will be reviewable on appeal from a final judgment". Id. at 862. The Seventh Circuit specifically refused to follow the Third Circuit's decision in Coastal Steel. Id. at 863-864.

In a similar case, the Fifth Circuit refused to enforce a contractual forum selection clause through an appeal of an order denying a motion to dismiss for improper venue. Louisiana Ice Cream Distributors, Inc. v. Carvel Corp., 821 F.2d 1031, 1033 (5th Cir. 1987). The Court concluded that the three-prong test of the collateral order doctrine was not

satisfied. Id. at 1033-1034. Again, the Court noted the Third Circuit's decision in Coastal Steel but refused to follow it. Id. at 1033 & n.2.

Indeed, the Eighth Circuit, the only other federal appeals court to entertain an appeal from an interlocutory order refusing to endorse a forum selection clause, conceded it did "not completely follow the rationale of Coastal Steel." Farmland Industries, Inc. v. Frazier-Parrott Commodities, Inc., 806 F.2d 848, 850 (8th Cir. 1986). It reasoned, instead, that the parties had bargained for one trial of their dispute and that a denial of an "immediate appeal of this issue will effectively deprive them of a contractual right." Id. at 850-51. This reasoning has been upset by the Supreme Court's subsequent decision in Stringfellow, which set forth that so long

as post-trial review of a pre-trial order is available, a collateral order appeal is not warranted. 107 S.Ct. at 1182-83. See also Carlenstolpe v. Merck & Co., 819 F.2d 33, 36-37 (2d Cir. 1987) (expense of litigation and "right not to proceed to trial in an inconvenient forum" do not satisfy third element of test for appealability as a collateral order); Nascone v. Spudnuts, Inc., 735 F.2d 763 (3d Cir. 1984) (order granting motion to transfer based on forum selection clause not an appealable collateral order; decision in Coastal Steel distinguished).

In view of the specific facts in the instant action, the decisions of the various circuits are not in conflict - no immediate appeal has ever been granted for the denial of a motion to dismiss on the basis of a forum selection clause involving passengers, not sophisticated

corporate entities, on a cruise ship. This is especially so since LAURO LINES can appeal the Order of the District Court denying the motion to dismiss following a disposition on the merits.

CONCLUSION

By reason of the foregoing, LAURO LINES' Petition for a Writ of Certiorari should be denied.

Respectfully submitted

MORRIS J. EISEN, P.C.
Attorneys for Plaintiffs
233 Broadway
New York, New York 10279
(212) 341-8300

MORRIS J. EISEN,
ARTHUR M. LUXENBERG
KENNETH A. SCHACHTER
Of Counsel